RECENT AMERICAN DECISIONS.

Court of Chancery of New Jersey.

WILLIAM M. DAVIS v. JOSEPH HOWELL.

On marshalling the assets of both partnership and individual estates, under separate assignments for the benefit of creditors, the partnership creditors are not entitled, after exhausting the partnership assets, to resort to the individual assets until after the individual creditors' claims have been satisfied.

BILL for relief. On final hearing on bill and answer.

J. F. Dumont, for complainant.

G. M. Shipman and *J. G. Shipman*, for answering defendants.

RUNYON, Chancellor.—John C. Bennett and James M. Andrews were, on or about the 10th of February 1876, partners in business in Phillipsburg. On that day they made an assignment under the Assignment Act, for the equal benefit of their creditors, to the complainant, William M. Davis. Five days after the making of that assignment Andrews made an assignment, under the Act, for the equal benefit of his creditors, to the complainant and Joseph Howell, and about the same time Bennett made a like assignment to Sylvester A. Comstock and Charles F. Fitch. The partnership estate will pay a dividend of only about eleven per cent. of the partnership debts. Most of the partnership creditors have put in their claims under the assignment of Andrews, and claim and insist upon a proportionate participation with his individual creditors therein as to so much of their claims as may not be paid out of the partnership estate, and they threaten the complainant and his co-assignee of Andrews's estate with legal proceedings if their demand be not complied with. The complainant therefore comes into this court for protection and instructions as to his duty in the premises. His co-assignee, Howell, is a creditor of Andrews's estate, and he is made a defendant.

The question presented has been often discussed, and, though there exists some contrariety of judicial determination upon it, must be considered as settled by the great weight of authority. The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of the separate estate: Story's Eq. Jur., sect. 675; Snell's Prin. of Eq. 419; Story on Part., sect. 376; Kent's Com. 64, 65; Parsons on Part. 480. And though the propriety of the rule has been often and persistently questioned on the ground that it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known, and has been so often stated, that it is profitless to repeat it. It was declared in 1715, in *Ex parte Crowder*, 2 Vern. 706; it was affirmed by Lord HARDWICKE, and though Lord THURLOW refused to follow it, it was restored by Lord LOUGHBOROUGH and followed by Lord ELDON, and it has existed ever since in the English chancery. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognised in this state: *Cammack* v. *Johnson*, 1 Gr. Ch. 163; *Matlack* v. *James*, 2 Beas. 126; *Mittnight* v. *Smith*, 2 C. E. Gr. 259; *Scull* v. *Alter*, 1 Harr. 147; *Curtis* v. *Hollingshead*, 2 Gr. 402; *Brown* v. *Bissett*, 1 Zab. 46; *Linford* v. *Linford*, 4 Dutch. 113. In *Scull* v. *Alter* the Supreme Court recognised the rule in all its parts. Chief Justice HORNBLOWER, by whom the opinion of the court was delivered (the question arose under an assignment under the Assignment Act, and was the same as is presented in this case), said: "But if it is an assignment not only of the partnership effects and property of the firm of Carhart & Britton, but also an individual and several assignment by them of their respective and several estates, then it must be treated as such. The estates and debts must be marshalled; the partnership effects applied in the first instance to the partnership debts; the effects of Carhart applied in the first instance to the payment of his separate debts, and in like manner the effects of Britton to the payment of debts due from him individually."

In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has been repudiated: *Camp* v. *Grant*, 21 Conn. 41. It has been repudiated also in certain other states; *Bardwell* v. *Perry*, 19 Vt. 292; *Emanuel* v. *Bird*, 19 Ala. 596. But the doctrine is recognised elsewhere, and has been established after thorough discussion and careful consideration. In *Wilder* v. *Keeler*, 3 Paige 167, Chancellor WALWORTH, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: "In the case now under consideration there was, at the death of G. F. Lush, a large joint fund belonging to the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree, have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors being a fund which could not be reached at law by the joint creditors whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors, upon the principle of this court that equality is equity." The doctrine was recognised in *Morgan* v. *Skidmore*, 55 Barb. 263. In Pennsylvania in *Bell* v. *Newman*, 5 S. & R. 78, 91, 92, GIBSON (afterwards Chief Justice), in a dissenting opinion, strongly supports the rule as one founded on the most substantial justice. In *Black's Appeal*, 44 Penn. St. 503, and again in *McCormack's Appeal*, 55 Penn. St. 252, the doctrine is completely recognised and affirmed. In South Carolina, in *Woddrop* v. *Price*, 3 Dessaus. 203; *Tunno* v. *Trezevant*, 2 Id. 264, and *Hall* v. *Hall*, 2 McCord's Ch. 269, the doctrine was held to be a doctrine of equity. In Massachusetts it is established by statute. In *Murrill* v. *Neill*, 8 How. 414, it is recognised by the Supreme Court of the United States.

The objection that is always pressed as the conclusive argument against it is, that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim as to the balance of his debt, which the partnership assets may not be sufficient to satisfy, with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate, he will not be deprived of it: *Wisham* v. *Lippincott*, 1 Stock. 353; *Randolph* v. *Daly*, 1 C. E. Gr. 313; *National Bank* v. *Sprague*, 5 Id. 13; *Howell* v. *Teel*, 2 Stew. Eq. 490. But if he has no such lien, and the assets are to be marshalled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt to the exclusion of the separate creditor, and to which he is indebted for the preference, will, in like manner and for like reason, give the latter preference upon the separate property. Such was the view of Chancellor KENT. He says: "So far as the partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged, and the separate creditors are only entitled in equity to such payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner:" 3 Kent's Com. 64, 65. The obvious infirmity of the objection to the rule is, that it leaves out of consideration the fact that it is to equity that the joint creditor is indebted for his preference. It is also urged that instead of the rule, it would be more equitable to require the joint creditor to have recourse to the partnership property before allowing him to participate in the separate estate, on the equitable ground that he has two funds for the payment of his debt, while the separate creditor has but one; but the rule as established is a rule of justice and equity. It has for its basis the presumption that joint debts have been contracted on the credit of the joint estate, and separate debts on that of the separate estate. It has the weight of great authority and long establishment, notwithstanding persistent objection and some fluctuation, and it is based on equitable principles. Sound policy is in its favor. Though there may be, as there is in the case of all such rules, instances in which it works unsatisfactorily, yet that on the whole, and as a rule, it has not operated unjustly, is evidenced by the fact that it has existed so long (*Ex parte Crowder* was decided in 1715), notwithstanding opposition, and that in Massachusetts, at least, it has, in the face of the opposition referred to, been established by legislative authority, and that, too, as lately as 1838. In this state it has, as has been shown, the sanction of our judicial tribunals, and it is too firmly established to be disturbed. It is true that in *Wisham* v. *Lippincott*, 1 Stock. 353, 356, the chancellor expressed strong doubt of its correctness, as a general rule; but in the other cases before cited, both previous and subsequent, the rule has been recognised without any expression of disapprobation or dissatisfaction.

There will be a decree that the joint assets be first applied to the payment of the joint debts, and the separate assets to the separate debts, and that the joint creditors may participate in any surplus of the separate assets which may remain after payment of the separate debts. The costs of the parties will be paid out of the funds represented by the complainant—the partnership estate—and Andrews's estate in equal shares.

The settlement of debts is a subject which is rendered complicated in the law by the relation of partnership. It is a mere truism to say that the subject is a very important one, so general is the relationship, and so extensive the dealings of persons who stand in that relationship. It is hoped that the following review of the authorities will not be without interest as recalling the general principles which control in such cases.

1. The *corpus* of the effects of a partnership is joint property. Neither partner separately has anything in that *corpus*, but the interest of each is only his share, in accordance with the partnership agreement, of what remains after the partnership debts are paid and the accounts are taken: *West* v. *Skip*, 1 Ves. 239; *Fox* v. *Hanbury*, Cowp. 445; *Taylor* v. *Fields*, 4 Ves. 396; *Witter* v. *Richards*, 10 Conn. 37; *Beecher* v. *Stevens*, 43 Id. 587; *Pierce* v. *Jackson*, 6 Mass. 243; *Place* v. *Sweetzer*, 16 Ohio 142; *Hurley* v. *Walton*, 63 Ill. 260; *Taft* v. *Schwamb*, 80 Id. 289; *Williams* v. *Gage*, 49 Miss. 777; *Gaines* v. *Coney*, 51 Id. 323; *California Furniture Co.* v. *Halsey*, 54 Cal. 315, 317; *Matlock* v. *Matlock*, 5 Ind. 403; *Swallow* v. *Thomas*, 15 Kans. 69; *Hall, Admr.*, v. *Clagett*, 48 Md. 223; *Menagh* v. *Whitwell*, 52 N. Y. 146, 158; *Meily* v. *Wood*, 71 Penn. St. 488; *Staats* v. *Bristow*, 73 N. Y. 264.

2. The partners have a lien on the partnership property for the payment of the partnership debts, and for the surplus due to each partner after the settlement of the partnership liabilities; but the creditors, as such, have no lien upon the partnership property, and must work out their rights through the equities of the partners: *Rice* v. *Barnard*, 20 Vt. 479; *Freeman* v. *Stewart*, 41 Miss. 139; *Sigler* v. *Knox County Bank*, 8 Ohio St. 511; *Hawk Eye Woollen Mills* v. *Conklin*, 26 Iowa 422; *O'Bannon* v. *Miller*, 4 Barb. 25; *Ransom* v. *Van Deventer*, 41 Barb. 313; *Menagh* v. *Whitwell*, 52 N. Y. 146; *Cope's Appeal*, 39 Penn. St 284; *Houseal's Appeal*, 45 Id. 485; *Foster* v. *Barnes*, 81 Id. 377; *Day* v. *Wetherby*, 29 Wis. 363; *Fain* v. *Jones*, 3 Head 308; *Case* v. *Beauregard*, 99 U. S. 119; *Campbell* v. *Mullett*, 2 Swanston's Ch. 550, 570; *Ex parte Ruffin*, 6 Ves. 119.

3. The principle is well settled that because of this lien of the partners, the firm's debts must be paid out of the firm's assets before the personal debts of the individual members of the firm can be paid therefrom: *Pease* v. *Rush*, 2 Minn. 112; *Chase* v. *Steel*, 9 Cal. 64; *Bullock* v. *Hubbard*, 23 Id. 501; *Lucas* v. *Atwood*, 2 Stew. (Ala.) 378; *Bridge* v. *McCullough's Admr.*, 27 Ala. 661; *Camp* v. *Mayer*, 47 Ga. 414; *Filley* v. *Phelps*, 18 Conn. 300; *Clark* v. *Allee*, 3 Harr. (Del.) 80; *Conant* v. *Frary*, 49 Ind. 530; *Cox* v. *Russell*, 44 Iowa 560; *Roberts* v. *Oldham*, 63 N. C. 298; *French* v. *Lovejoy*, 12 N. H. 458; *Bass* v. *Estill*, 50 Miss. 300; *Williams* v. *Gage*, 49 Id. 777; *Phelps* v. *McNeely*,

66 Mo. 558; *Frow, Jacobs & Co.'s Estate*, 73 Penn. St. 459; *Carper* v. *Hawkins*, 8 W. Va. 291; *Converse* v. *McKee*, 14 Texas 30; *Johnson* v. *King*, 6 Hum. 233; *Christian* v. *Ellis*, 1 Gratt. 396; *Washburn* v. *Bellows Falls Bank*, 19 Vt. 278.

4. The right of creditors to be first paid out of the firm's assets being a right derived through the equities of the partners and dependent upon these equities, it follows that if the partners waive their equities and consent to the appropriation of the firm's assets to the payment of a personal debt of an individual member of the firm, no one can raise objection thereto, the firm being solvent: *Schmidlapp* v. *Currie*, 55 Miss. 597; s. c., 18 Am. Law Reg. (N. S.) 108; *National Bank* v. *Sprague*, 20 N. J. Eq. 14; *Carter* v. *Beaman*, 6 Jones Law 44; *Marks* v. *Hill*, 15 Gratt. 400; *Mayer* v. *Clark*, 40 Ala. 259; *Reeves* v. *Ayers*, 38 Ill. 418; *Jones* v. *Lusk*, 2 Met. (Ky.) 362.

(*a*) But without the assent of the copartners the partnership assets cannot be applied to the individual debt of one of the members: *Todd* v. *Lorah*, 75 Penn. St. 155; *Corwin* v. *Suydam*, 24 Ohio St. 209; *Atkin* v. *Berry*, 1 B. J. Lea 91; *Perry* v. *Butt*, 14 Ga. 699; *Filley* v. *Phelps*, 18 Conn. 300; *Lanier* v. *McCabe*, 2 Fla. 32; *Furman* v. *Fisher*, 4 Coldw. 626; *Smith* v. *Andrews*, 49 Ill. 28; *Caldwell* v. *Scott*, 54 N. H. 414; *Flanagan* v. *Alexander*, 50 Mo. 50; *Ross* v. *Henderson*, 77 N. C. 172; *Blodgett* v. *Sleeper*, 67 Me. 500; *Williams* v. *Barnett*, 10 Kans. 455; *Hamilton* v. *Hodges*, 30 La. Ann. 1290.

(*b*) When the separate credit or of a partner takes partnership property in payment of his debt, knowing at the time that it is partnership property, he acquires no rights therein as against the partnership, and it may be recovered back, the copartners not having assented to such an appropriation: *Mix* v. *Muzzy*, 28 Conn. 190; *Moriarty* v. *Bailey*, 46 Id. 592; *Major* v. *Hawkes*, 12 Ill. 298, *Ross* v. *Henderson*, 77 N. C. 172; *Daniel* v. *Daniel*, 9 B. Monr. 196.

(*c*) And the partnership property may be recovered back, although the creditor did not know that the funds belonged to the partnership, provided he has parted with no security which he previously held: *Moriarty* v. *Bailey*, 46 Conn. 592. See, too, *Ackley* v. *Staehlin*, 56 Mo. 558.

(*d*) But the doctrine is generally laid down more broadly, to the effect that the transfer passes the title as against the partnership and its creditors, provided the separate creditor acted in good faith and without notice that the property belonged to the partnership: *Locke* v. *Lewis*, 124 Mass. 1; *Wiley* v. *Allen*, 26 Ga. 568.

(*e*) The knowledge and assent of the partners to the application of partnership property to the payment of the separate debt must be clearly shown: *Wise* v. *Copley*, 36 Ga. 508. See *Darling* v. *March*, 22 Me. 184; *Blodgett* v. *Sleeper*, 67 Id. 500; *Keith* v. *Fink*, 47 Ill. 272.

(*f*) It has been held that partnership assets cannot be applied, even with consent of copartners, to the payment of the individual debt of a partner, if the firm is insolvent. The reason upon which the principle is based, being that insolvent partners are to be considered as holding their joint property for the benefit of their joint creditors, and that a misappropriation is to be deemed in fraud of the implied trust. That a division by partners of copartnership assets under such circumstances, and a transfer of such assets by individual partners in payment of individual debts, is a fraud upon firm creditors, and it is, therefore, held that such transfer is invalid until the property comes to the hands of a *bonâ fide* purchaser for a new and valuable consideration: *Menagh* v. *Whitwell*, 52 N. Y. 146, 153, 161, 162; *Ransom* v. *Van Deventer*, 41 Barb. 307. And see *Burtus* v. *Tisdall*, 4 Barb. 580; *Wilson* v.

Robertson, 21 N. Y. 587; *Saloy* v. *Albrecht*, 17 La. Ann. 75; *Flack* v. *Charron*, 29 Md. 311. See, too, *Schmidlapp* v. *Currie*, 55 Miss. 597; s. c., Am. Law Reg. (N. S.) 108; where it is said that an appropriation to pay individual debts may be made with assent of copartners, where the firm "is neither bankrupt nor contemplating bankruptcy," and where there is a *bonâ fide* consideration therefor. But in *Marks* v. *Hill*, 15 Gratt. 400, it is asserted that such appropriation may be made, although the partnership is unable to pay its firm debts.

5. By the transfer of the joint property to his co-partner, and taking his personal contract and security for the payment of the joint debts, the partner loses his lien, the agreement of the co-partner being substituted therefor, and the property becomes the separate property of such co-partner, who is entitled to use it as such: *Ex parte Ruffin*, 6 Vesey 119; *Howe* v. *Lawrence*, 9 Cush. 555. 558; *Dimon* v. *Hazard*, 32 N. Y. 65; *Menagh* v. *Whitwell*, 52 N. Y. 146, 160; *Hapgood* v. *Cornwell*, 48 Ill. 64; *Case* v. *Beauregard*, 99 U. S. 119; *Kimball* v. *Thompson*, 13 Met. 283; *Robb* v. *Mudge*, 14 Gray 534; *Baker's Appeal*, 21 Penn. St. 76; *Wilcox* v. *Kellogg*, 11 Ohio 394; *Vosper* v. *Kramer*, 31 N. J. Eq. 420; *Andrews* v. *Mann*, 31 Miss. 322; *Rankin* v. *Jones*, 2 Jones (N. C.) Eq. 169; *City of Maquoketa* v. *Willey*, 35 Iowa 323; *Smith* v. *Edwards*, 7 Hum. 106; *Allen* v. *Centre Valley Co.*, 21 Conn. 130; *Croone* v. *Bivens*, 2 Head 189. But see *Rogers* v. *Nichols*, 20 Tex. 726; *Tenney* v. *Johnson*, 43 N. H. 144; *Phelps* v. *McNeely*, 66 Mo. 558; *Flanagan* v. *Alexander*, 50 Id. 50; *Succession of Beer* v. *Goodman*, 12 La. Ann. 698.

6. As partnership creditors have no lien in their own right upon the partnership property, but work out their preference solely through the equity of the partners, do the partnership creditors lose their rights to a priority, supposing each partner transfers his interest to a third party? For instance, A., B. & C. are in partnership. The partnership property amounts to $300,000, and the partnership debts to $150,000. A. sells out his interest to D., who would take $50,000, as the partnership creditors still had a lien through the equities of the remaining partners. But before the creditors have exercised their right to levy on the firm's property, the interests of B. and C. are sold to E. Now, it has been claimed that at this point each partner has lost his lien, and that the lien of the partners being gone, the right of the partnership creditors to the payment of their debts out of the property was gone also. That being the case, D.'s share in the property would be at once changed from $50,000 to $100,000. Mr. Justice GIBSON was of the opinion in *Coover's Appeal*, 29 Penn. St. 9, that by this last sale, the property of the firm would be relieved from partnership debts, and that the share first sold would be at once changed from an interest in the surplus to a share in the *corpus* of the property free from debts. There was nothing in the case which made necessary the expression of such an opinion, and it must be regarded as an *obiter dictum*. But the question came up fairly in New York not long since in *Menagh* v. *Whitwell*, 52 N. Y. 146, and a conclusion reached contrary to the opinion expressed in *Coover's Appeal*. It was held that the equity of the partners was not lost, and that the property was still subject to the payment of the partnership debts. The question is certainly a nice one, and future adjudications in reference to it will be awaited with interest. But the rule seems to be settled in Pennsylvania in accordance with the opinion expressed in *Coover's Appeal*, that when the partners have lost dominion of the partnership property by a sale of their interests, the equity of creditors whose liens had not actually attached is thereby destroyed: *McNutt* v. *Strayhorn*, 39 Penn. St. 269; citing

Doner v. *Stauffer*, 1 P. & W. 198; *Kelly's Appeal*, 4 Harris 59; *Baker's Appeal*, 9 Id. 77; *Coover's Appeal*, *supra*. And in this connection the opinion of Justice STRONG, as expressed recently in *Case* v. *Beauregard*, 99 U. S. 119, is important. "If, before the interposition of the court is asked," so he says, "the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced."

7. It has been held that where a partnership is composed of two or more firms, the creditors of one of the firms are entitled to a preference in payment of their debts, over creditors of the whole partnership: *Bullock* v. *Hubbard*, 23 Cal. 495.

8. But where the same partners carry on the same business at different places under different partnership names, the creditors holding claims nominally against one firm are not entitled to be first paid out of the assets held under that firm name, but the assets of both nominal firms are equally applicable to the payment of all the creditors of both: *In re Vetterlein*, 5 Benedict 311; *In re Williams*, 3 Wood 493. See *Buckner* v. *Calcote*, 28 Miss. 432, 586, 587, to same effect.

9. And partnership debts must be paid before the debts of a former partnership, of which one of the present firm was a member: *Camp* v. *Mayer*, 47 Ga. 414; *Hurlburt* v. *Johnson*, 74 Ill. 64.

10. In equity, the real property acquired by a partnership for partnership purposes is regarded as personal estate so far as payment of partnership debts is concerned, and also as regards the adjustment of all partnership rights: *Little* v. *Snedecor*, 52 Ala. 167; *Caldwell* v. *Parmer*, 56 Ala. 405; *Dupuy* v. *Leavenworth*, 17 Cal. 262; *Drewry* v. *Montgomery*, 28 Ark. 256; *Lowe* v. *Lowe*, 13 Bush 688; *Galbraith* v. *Gedge*, 16 B. Mon. 633; *Foster* v. *Barnes*, 81 Penn. 377; *Williamson* v. *Fontain*, 7 Baxter 212; *Beecher* v. *Stevens*, 43 Conn. 587; *Rammelsberg* v. *Mitchell*, 29 Ohio. St. 22; *Hogle* v. *Lowe*, 12 Nev. 286; *Arnold* v. *Wainwright*, 6 Minn. 358; *Faulds* v. *Yates*, 57 Ill. 416; *Hewitt* v. *Rankin*, 41 Iowa 35; *Roberts* v. *McCarty*, 9 Ind. 16. At law, however, the title is vested in the several partners as tenants in common: *Wood* v. *Montgomery*, 60 Ala. 500.

11. The weight of authority seems to be in favor of the proposition that partners cannot claim an individual exemption in the partnership property, the property having been levied upon for a debt of the firm before the claim to an exemption was asserted: *Pond* v. *Kimball*, 101 Mass. 105; *Billingsley* v. *Spencer*, 64 Mo. 355; *Gaylord* v. *Imhoff*, 26 Ohio St. 317; *Guptil* v. *McFee*, 9 Kans. 30; *Giovanni* v. *First Nat. Bank of Montgomery*, 55 Ala. 307, overruling 50 Ala. 47, and Id. 251; also, 51 Ala. 177; *In re Handlin*, 3 Dillon 290; *Bonsall* v. *Comly*, 44 Penn. St. 442, 447; *Wise* v. *Frey*, 7 Neb. 134; *Russell* v. *Lennon*, 39 Wis. 570; *Love* v. *Blair*, Sup. Ct. of Indiana, March 1881. See *Harris* v. *Visscher*, 57 Ga. 229, 231. *Per contra*: *Stewart* v. *Brown*, 37 N. Y. 350; *Radcliff* v. *Wood*, 25 Barb. 52; *In re Young*, 3 Bank Reg. 440; *In re Rupp*, 4 Id. 95; *In re McKercher*, 8 Id. 409.

(*a*) In North Carolina, it is held that a partner is entitled to an exemption out of the partnership property, provided all the partners assent thereto: *Burns* v. *Harris*, 67 N. C. 140.

(*b*) In *Wise* v. *Frey*, 7 Neb. 134, a distinction is taken, and the opinion is expressed that when the judgment was against the partner in his individual capacity, he would be entitled to claim his exemption out of his share of the partnership effects. See *Servanti* v. *Lusk*, 43 Cal. 238; *Newton* v. *Howe*, 29 Wis. 536.

(*c*) A homestead cannot be carved out of partnership property: *Terry* v. *Berry*, 13 Nevada 515.

12. In equity, partnership debts are joint and several: *Wisham* v. *Lippincott*, 1 Stock. (N. J.) 354; *Tillyaw* v. *Laverty*, 3 Fla. 72; *Strong* v. *Niles*, 45 Conn. 52; *Haralson* v. *Campbell*, 63 Ala. 278; *Kent* v. *Wells*, 21 Ark. 411; *Silverman* v. *Chase*, 90 Ill. 37; *Freeman* v. *Stewart*, 41 Miss. 138; *Irby* v. *Graham*, 46 Miss. 427; *Hilliker* v. *Francisco*, 65 Mo. 604.

13. Upon the death of one of the partners, the survivor is entitled to the possession of the partnership assets, which he holds in trust for the payment of the partnership debts: *Robertshaw* v. *Hanway*, 52 Miss. 713; *Bassett* v. *Miller*, 39 Mich. 133; *Miller* v. *Jones*, 39 Ill. 54; *Shields* v. *Fuller*, 4 Wis. 102; *Wilson* v. *Soper*, 13 B. Monr. 517; *Glass* v. *Ludlum*, 8 Kans. 48; *Price* v. *Hicks*, 14 Fla. 565; *Costley* v. *Wilkerson*, 49 Ala. 210: *Strange* v. *Graham*, 56 Ala. 614; *Hanna* v. *Wray*, 77 Penn. St. 27.

(*a*) If the surviving partner does not account within a reasonable time, equity will enjoin him from acting and appoint a receiver: *Nelson* v. *Hayner*, 66 Ill. 487.

(*b*) The surviving partner is not entitled to any compensation for winding up the business of the firm and attending to the payment of its debts: *Gyger's Appeal*, 62 Penn. St. 73; *Brown* v. *McFarland*, 41 Id. 129; *Piper* v. *Smith*, 1 Head 93.

(*c*) He is entitled to give a preference to a particular creditor of the firm as against the other creditors of the firm: *Wilson* v. *Soper*, 13 B. Monr. 417; *Loeschigk* v. *Hatfield*, 51 N. Y. 660; *Roach* v. *Brannon*, 57 Miss. 500, where it is said: "He is the legal owner of the entire assets, and a firm creditor who has received nothing, has no more right to complain that some other *bona fide* firm creditor has been paid in full, than the individual creditor of an ordinary person would have under the same circumstances."

14. The earlier cases held that there must be an insolvency of the surviving partner, before a partnership creditor could reach the estate of the deceased partner for the payment of his debt: *Cowell* v. *Sikes*, 2 Russ. 191; *Campbell* v. *Mullett*, 2 Swanst. 574; *Ex parte Kendall*, 17 Vesey 514; *Pendleton* v. *Phelps*, 4 Day (Conn.) 481; *Alsop* v. *Mather*, 8 Conn. 587.

But it has been subsequently laid down that the creditor can elect to proceed against the estate of the deceased partner, without regard to the state of the firm assets: *Devaynes* v. *Noble*, 1 Meriv. 529; *Wilkinson* v. *Henderson*, 1 Myl. & K. 582; *Freeman* v. *Stewart*, 41 Miss. 138; *Mason* v. *Tiffany*, 45 Ill. 392; *Silverman* v. *Chase*, 90 Ill. 37; *Fillyau* v. *Laverty*, 3 Fla. 72; *Camp* v. *Grant*, 21 Conn. 41.

In New York, the rule is that the creditor must show an inability to collect his debt from the surviving partner: *Voorhis* v. *Childs*, 17 N. Y. 354; *Richter* v. *Poppenhausen*, 42 N. Y. 373; *Pope* v. *Cole*, 55 N. Y. 126.

15. The effect of the bankruptcy of one co-partner is to dissolve the firm, and to render the solvent members of the firm and the assignee of the bankrupt tenants in common of the partnership effects: *Halsey* v. *Norton*, 45 Miss. 703. Hence the rule is, that after one member of a firm has been adjudged a bankrupt, and has executed an assignment to his assignee, the solvent partner and such assignee must join in an action to collect a claim due to the firm: *Graham* v. *Robinson*, 2 Durn. & East 282; *Eckhardt* v. *Wilson*, 8 Id. 140; *Browning* v. *Browning*, 29 N. Y. (Supt. Ct.) 547.

16. A discharge in bankruptcy of one

member of a firm under proceedings giving no schedule of partnership debts or assets, and not praying for a discharge from such liabilities, does not relieve the bankrupt from liability for partnership debts: *Poillon* v. *Lawrence*, 77 N. Y. 207; *Corey* v. *Perry*, 67 Me. 140; *Lindsey* v. *Corkery*, 29 Gratt. 650.

17. It has been held that where one partner turns over the assets of the firm to his co-partner, and retires, the continuing partner assuming and agreeing to pay all the debts, and creditors are notified of such arrangement, the liability of the retiring partner is changed from that of a principal to that of a surety, and he is released from all liability if the creditor grants an extension of time to the principal without the assent of the surety: *Smith* v. *Shelden*, 35 Mich. 42; s. c. 16 Am. Law Reg. (N. S.) 292; *Millerd* v. *Thorn*, 56 N. Y. 402; *Harris* v. *Lindsay*, 4 Wash. C. C. 271. See *McNeal's Adm'r* v. *Blackburn*, 7 Dana 170; *Stone* v. *Chamberlain*, 20 Geo. 259; *Oakeley* v. *Pashell*, 4 Cl. & Fin. 207; s. c. 10 Bligh's New Parl. R. 548; *Evans* v. *Drummond*, 4 Esp. 90; *Conwell* v. *McCowan*, 81 Ill. 286. *Per contra: Maingay* v. *Lewis*, Irish R. Com. Law 495 (1869).

The doctrine does not apply, of course, where the creditor expressly reserves his right against the other partner: *Bedford* v. *Deakin*, 2 B. & Ald. 210.

In *Colgrove* v. *Tallman*, 67 N. Y. 85, it was held that where the joint creditor had knowledge that one partner had assumed the debts, and where he was requested by the retiring partner to collect his claim and neglected to do so, the principal thereafter becoming insolvent, the retiring partner was thereby discharged.

18. A release of one of two p rtners with a proviso that it should not prejudice releasor's claim against the other partner, does not discharge the latter: *Solby* v. *Forbes*, 6 E. C. L. R. 11; *Thompson* v. *Lack*, 54 Id. 540; *Greenwald* v. *Kaster*, 85 Penn. St. 46. In this last case it is said: "The rule that a release of one joint obligor or promissor operates as a release of his co-obligors or promissors has long been confined to technical releases, and these by means of recitals may be limited to one alone."

19. As partnership creditors have a preference over individual creditors on the partnership assets, the question arises whether the individual creditors have a like preference on the separate estate. There has been a difference of opinion upon this question. In some cases the right has been doubted and in others expressly denied: *Wisham* v. *Lippincott*, 1 Stock. (N. J.) 353; *Morris* v. *Morris*, 4 Gratt. 293; *Higgins* v. *Rector*, 47 Tex. 361; *Cleghorn* v. *Ins. Bank of Columbus*, 9 Ga. 319; *Camp* v. *Grant*, 21 Conn. 41, 60; *Bardwell* v. *Perry*, 19 Vermont 292.

But the general rule is that announced in the particular case, that firm creditors have in equity a prior claim upon the partnership property, and the separate creditors a like preference upon the separate property, with a right in the creditors of one class to share in any surplus which may remain after the creditors of the other class have been satisfied. This rule is sustained by the great weight of authority: *Toombs* v. *Hill*, 28 Ga. 371; *Thornton* v. *Bussey*, 27 Id. 302; *Matlock* v. *Matlock*, 5 Ind. 403; *Holland* v. *Fuller*, 13 Id. 195; *Union Nat. Bank* v. *Bank of Commerce*, 94 Ill. 271; *Rainey* v. *Nance*, 54 Ill. 209; *Morrison* v. *Kurtz*, 15 Id. 196; *Ladd* v. *Griswold*, 4 Gilm. 25; *Gillaspy* v. *Peck*, 46 Iowa 462; *McCulloh* v. *Dashiell*, 1 H. & Gill 99; *Irby* v. *Graham*, 46 Miss. 427; *Kirby* v. *Shoonmaker*, 3 Barb. Ch. 49; *Wilder* v. *Keeler*, 3 Paige 167; *Morgan* v. *Skidmore*, 55 Barb. 263; *In the Matter of Rieser*, 26 N. Y. (Sup. Ct.) 202; *Rodgers* v. *Meranda*, 7 Ohio St. 179; *Brock* v. *Bateman*, 25 Ohio St. 609; *McCormack's Appeal*, 55 Penn. St. 252; *Black's Appeal*, 44 Id. 503; *Penning-*

ton v. *Bell*, 4 Sneed. 200; *Jackson Ins. Co.* v. *Partee*, 9 Heisk. 298; *Tillinghast* v. *Champlin*, 4 R. I. 173, 190; *Woddrop* v. *Price*, 3 Dess. 207; *Hall* v. *Hall*, 2 McCord's Ch. 302; *South Boston Iron Co.* v. *Holmes*, 4 Cliff. 343; *Murrill* v. *Neill*, 8 How. (U. S.) 414. The New Jersey cases, in support of the rule, are collected in the particular case. The principle was established in Massachusetts by statute in 1838. See *Howe* v. *Lawrence*, 9 Cush. 555. In Kentucky, the rule is not adopted in its entirety, but the principle there laid down by the courts is that the per cent. derived from the firm assets should be ascertained, and individual creditors to the same extent should be allowed an exclusive compensation out of individual assets, and that then an equal pro rata should be allowed to both: *Northern Bank* v. *Keizer*, 2 Duval 169; *Whitehead* v. *Chadwell*, 2 Id. 432. The right of individual creditors to a preference on the individual or separate estate is also asserted in *Holton* v. *Holton*, 40 N. H. 77; *Bowker* v. *Smith*, 48 Id. 120; *Miller* v. *Clarke*, 37 Iowa 325; *Moline Co.* v. *Webster*, 26 Ill. 233.

But that the rule laid down in the particular case does not apply where there is no joint fund and no solvent partner, seems to be equally well settled: *Ex parte Sadler*, 15 Vesey 52; *Janson's Case*, 3 Madd. 229; *Peake's Case*, 2 Rose 54 and note; *Pahlman* v. *Graves*, 26 Ill. 405; *Brock* v. *Bateman*, 25 Ohio St. 609; s. c., 15 Am. Law Reg. (N. S.) 214; *Smith* v. *Mallory*, 24 Ala. 628; *Daniel* v. *Townsend*, 21 Ga. 155; *Higgins* v. *Rector*, 47 Texas 361; *In re Downing*, 2 Dillon 136; *In re Knight*, 2 Bissell 518; *In re McEwen*, 6 Id. 294. But the Massachusetts court in *Howe* v. *Lawrence*, 9 Cush. 555, says that under the statute the rule is applicable in that state even though there is no joint estate and no silent partner. In *Weyer* v. *Thornburgh*, 15 Ind. 124, the rule was also said to be applicable even though there were no joint assets.

20. Partnership goods may, however, be levied upon to satisfy the separate debt of one of the partners: *Weaver* v. *Ashcroft*, 50 Texas 427; *White* v. *Woodward*, 8 B. Mon. 485.

(*a*) The sheriff should levy on the interest of that partner in the partnership estate, he may also take possession of the entire property, and if he only sells the interest of the partner against whom the judgment was rendered, he is not liable in damages to the other partner: *Clark* v. *Cushing*, 52 Cal. 617; *Davis* v. *White*, 1 Houston 228; *Moore* v. *Sample*, 3 Ala. 319; *Stevens* v. *Stevens*, 39 Conn. 474, 480; *Saunders* v. *Bartlett*, 12 Heisk. 316; *Newhall* v. *Buckingham*, 14 Ill. 405; *Moore* v. *Pennell*, 52 Me. 162; *Atkins* v. *Saxton*, 77 N. Y. 195.

(*b*) But if the sheriff, instead of levying on the debtor's interest, levies upon and seizes the partnership property as the sole property of the debtor partner, he becomes a trespasser, and is liable as such: *Atkins* v. *Saxton*, 77 N. Y. 195.

(*c*) One purchasing at sheriff's sale the interest of one partner in the partnership property, does not acquire a right superior to the rights of the copartner or of the joint-creditors, but he takes whatever interest remains in the debtor partner after the payment of the partnership debts: *Chandler* v. *Lincoln*, 52 Ill. 74; *Rainey* v. *Nance*, 54 Id. 29; *Ross* v. *Henderson*, 77 N. C. 173; *Doe* v. *Hunt*, 11 Ired. 42; *Andrews* v. *Keith*, 34 Ala. 722; *Wilson* v. *Strobach*, 59 Id. 492; *Donnellan* v. *Hardy*, 57 Ind. 393.

(*d*) The right of one so purchasing is the right to an accounting and to share in the surplus belonging to the debtor partner: *Morss* v. *Gleason*, 64 N. Y. 204.

21. Where judgment is recovered against one partner on his individual debt, and execution issues, a levy being made on his interest in the partnership, but before the sale executions issue against the same property on judgments against the firm for firm debts, the latter executions have priority: *Ryder* v. *Gil-*

bert, 23 N. Y. (Sup. Ct.) 164; *Eighth Nat. Bank* v. *Fitch*, 49 Id. 595; *Minor* v. *Pierce*, 38 Vt. 610; *Coover's Appeal*, 29 Penn. St. 9; *Trowbridge* v. *Cushman*, 24 Pick. 310.

(*a*) And an attachment of partnership property for a partnership debt, prevails over a prior attachment of the same property for the separate debt of one of the partners: *Pierce* v. *Jackson*, 6 Mass. 242; *Fargo & Co.* v. *Ames*, 45 Iowa 492; *Cox* v. *Russell*, 44 Id. 560; *Howell* v. *Commercial Bank*, 5 Bush 101; *O'Bannon* v. *Miller*, 4 Id. 25.

(*b*) But it has been held that, where in a suit against copartners the separate property of either partner is attached, the lien thus acquired is not discharged or impaired by the subsequent attachment of the same property by the separate creditor of the same partner: *Allen* v. *Wells*, 22 Pick. 450; *Newman* v. *Bagley*, 16 Id. 570; *Stevens* v. *Perry*, 113 Mass. 380. A contrary view has been taken of the matter in New Hampshire. See *Jarvis* v. *Brooks*, 23 N. H. 136; *Crockett* v. *Crain*, 33 Id. 550.

(*c*) The preference which the law gives the creditors of a partnership will be protected in proceedings of garnishment by firm and individual creditors: *Switzer* v. *Smith*, 35 Iowa 269. In *Sheedy* v. *Second Nat. Bank*, 62 Mo. 17, it is held that, in attachment against an individual a person is not liable to garnishment who is indebted to the firm of which he is a member.

22. A firm debt cannot be set off against a debt due from one of the partners: *Houston* v. *Brown*, 23 Ark. 333; *Sager* v. *Tupper*, 38 Mich. 258; *Weil* v. *Jones*, 70 Mo. 560. In *Chamberlain* v. *Stewart*, 6 Dana 32, it is held that partners may set off a debt due to the firm by an insolvent debtor against one due to the latter by one of the partners. In *Johnson* v. *Kaiser*, 40 N. J. Law 286, it is held that a surviving partner in an action against himself to recover a debt which he individually incurred, may set off a claim due to the firm. In *Jones* v. *Blair*, 57 Ala. 458, it is held that a firm debt cannot be set off against a debt due from one of the partners, even with the consent of his copartners, as a set off to be available must be owned by the defendant in his own absolute right at the time suit was brought.

23. And an individual debt cannot be set off against a debt due to the firm: *Harlow* v. *Rosser*, 28 Ga. 219; *Collier* v. *Dyer*, 27 Ark. 478; *Meeker* v. *Thompson*, 43 Conn. 77. In *Montz* v. *Morris*, 89 Penn. St. 392, it is held, however, that such off-set may be allowed with the consent of copartners.

24. A new partner is not liable for the debts of the old firm, unless he expressly agrees to assume them: *Shamburg* v. *Ruggles*, 83 Penn. St. 148; *Kountz* v. *Holthouse*, 85 Id. 235; *Fagan* v. *Long*, 30 Mo. 222; *Gauss* v. *Hobbs*, 18 Kans. 504; *Piano Co.* v. *Bernard*, 2 B. J. Lea 358; *Parmalee* v. *Wiggenhorn*, 6 Neb. 322.

25. A retiring partner is liable, in absence of actual notice, to those who have had prior dealings with the firm. *Holtgreve* v. *Wintker*, 85 Ill. 470: *Haynes* v. *Carter*, 12 Heisk. 7; *Austin* v. *Holland*, 69 N. Y. 571; *Howell* v. *Adams*, 68 Id. 314; *Kenney* v. *Altvater*, 77 Penn. St. 34; *Polk* v. *Oliver*, 56 Miss. 566; *Dickinson* v. *Dickinson*, 25 Gratt. 321; *Kennedy* v. *Bohannon*, 11 B. Mon. 119; *Lovejoy* v. *Spafford*, 93 U. S. 430.

26. The common law did not admit of partnerships with restricted liability, and statutes authorizing limited partnerships must be substantially complied with, or those who associate under it, will be liable as general partners: *Van Ingen* v. *Whitman*, 62 N. Y. 513; *Smith* v. *Argall*, 6 Hill 479; s. c., 3 Denio 435; *Bowen* v. *Argall*, 24 Wend. 496; *Richardson* v. *Hogg*, 38 Penn. St. 153; *Andrews* v. *Schott*, 10 Id. 47; *Henkel* v. *Heyman*, 91 Ill. 101.

HENRY WADE ROGERS.

United States Circuit Court, Northern District of Illinois.

HENRY R. ALLERTON *v.* CITY OF CHICAGO AND CHICAGO CITY RAILWAY CO.

The police power is inherent in a municipal corporation, and cannot be transferred.

Power to "regulate the management" of a business includes the power to require a license for carrying it on.

Under a statute authorizing a city to license hackmen, omnibus drivers, "and others pursuing like occupations," the city has the power to require street railway companies to take out licenses for their cars.

The distinction between the taxing and the police power discussed by DRUMMOND, J.

SUR demurrer to bill in equity.

The council of the city of Chicago passed an ordinance requiring the companies which operated street cars for the conveyance of passengers upon any lines of horse or city railway within the city of Chicago, to obtain a license in the month of April, of each year, and pay for the same the sum of fifty dollars for each car operated or run. A penalty was imposed for failing or refusing to take out a license. The company obtaining the license was required to place conspicuously in every car so operated and run in the city, a certificate signed by the city clerk, and giving the number of the car, and stating that a license had been obtained, and that the necessary fee had been paid; and a penalty was also imposed for a failure to post or keep such certificate in the car.

The plaintiff, a stockholder in the Chicago City Railway Company, filed this bill to enjoin the payment of the license fee required by the ordinance. The defendants demurred.

Hitchcock, Dupee & Judah, C. Beckwith and *Goudy, Chandler & Skinner*, for plaintiff.

R. S. Tuthill and *A. S. Bradley*, for the defendants.

DRUMMOND, Circuit Judge.—The only question in the case is, whether the ordinance in question is valid. Several corporations operating street cars in the city of Chicago, have been authorized to construct their railways and operate them, by various ordinances which have been from time to time passed; and these ordinances have been recognised and affirmed, many of them by the legislature of the state. By virtue of these ordinances and acts of the legislature, the companies have the right to run their cars for the transit of passengers through the city. It cannot be said, therefore, that the effect of the ordinance which has been specially referred to, although it is called a license, would be to give the companies the privilege of running their cars. That they have by virtue of the ordinance and the acts of the legislature. There can be no doubt that the legislature would have the right, under the Constitution of 1848, which was in force when the franchise was granted, to tax the corporations for the use of their franchise. That is a tax which is entirely independent of the value of the cars, tracks and other tangible property of the corporations, and so treated by the Constitutions of 1848 and 1870. But there are many difficulties with this branch of the subject. There are certain conditions required by the Constitution of 1870 as pre-requisites to the imposition of a tax of this kind, even conceding that the legislature has authorized the city to impose the tax, and I, therefore, without giving any decided opinion upon that part of the case, prefer to place my decision upon another ground, and to sustain the ordinance as a regulation of the police power of the city. This is always a subsisting power which it is generally held cannot be transferred by the city, but is inherent in its municipal organization. There can be no controversy about the power of the city over many things connected with the operation of the city railways. Admitting that because of the price of fare agreed upon there can be no change in that, yet by virtue of its police power, the city can, to a great extent, regulate the running of the cars, prescribe rules and laws as to speed, stoppage and other things connected with the operation of the railway. This has not been questioned by the counsel of the plaintiff; but it is claimed this cannot be considered a police regulation, because it is manifestly the exercise of the taxing power of the city. It is argued that the price of the license is so large that the intent is manifest. It is very difficult to lay down any absolute rule upon this subject, and to hold that a particular sum may be within the police power of the city, and another sum beyond the power, and a mere tax.

By the general law of 1872, for the incorporation of cities and villages in this state, it is provided that the city council in cities shall have authority to license hackmen, draymen, omnibus drivers, cabmen. expressmen, and all others pursuing like occupations, and to prescribe their compensation. This was obviously intended as conferring a police power upon the city council in relation to the various classes named in the statute. This is a power that has been uniformly exercised, and construing the statute literally, cannot well be questioned. But it is claimed that it does not include the street railway, because it is not pursuing an occupation like any of those named.

Omnibuses may be licensed. They may pass over even the same streets as those occupied by the horse railways, and they may carry passengers in the same manner. The only distinction which can be called substantial between the two classes of occupation, is that one carriage goes upon iron rails, in a regular track, with wheels, and the other carriage goes with wheels upon the ordinary street way.

The Supreme Court of Pennsylvania has held that these street railway carriages are of a like nature as omnibuses, and there can be no doubt, I think, of the right of the city to demand a license from all omnibus drivers, and to include every omnibus which may belong to a particular company or corporation, and to require the payment of a license for such omnibus that may be so owned and used.

The Court of Appeals of New York, in the case of *Mayor* v. *Second Avenue Railroad*, 32 N. Y. 261, held that an ordinance of the city of New York, in many respects like this, was invalid, as an attempt, through color of a license, to impose a tax upon the railroad company, refusing to treat it as an exercise of the police power of the city. The price charged in that case for the license was the same as in this.

In the case of *Frankford & Philadelphia Passenger Co.* v. *City of Philadelphia*, 58 Penn. St. 119, where the license fee was the same, and *Johnson* v. *Philadelphia*, 60 Penn. St. 445, the Supreme Court of Pennsylvania took a different view of such an ordinance, and treated it as a police regulation merely; and such seems to be the view of the Supreme Court of this state, in the case of the *Chicago Packing & Provision Co.* v. *City of Chicago*, 88 Ill. 221.

In the case of *Frankford & Philadelphia Passenger Co.* v. *City of Philadelphia*, the city obtained its power to impose the license from a statute substantially similar to that under which the city of Chicago claims the power in this case. In that case the Act of the legislature declared that the City Council of Philadelphia should have authority to provide for the proper regulation of omnibuses, or vehicles in the nature thereof, and to this end "it shall be lawful for the council to provide for the issuing of licenses to such and so many persons as may apply to keep and use omnibuses, or vehicles in the nature thereof, and to charge a reasonable annual or other sum therefor." In that statute, the words "vehicles in the nature thereof;" in this, the words "pursuing a like occupation" are used. I cannot see that there is any substantial distinction in that respect between the two statutes.

In the case in 88 Illinois, already referred to, the corporation was organized and doing business under the laws of this state. A question arose in that case as to the power of the city to issue a license. It was denied, in the argument of the case, that the power existed, but the Supreme Court held that under the power "to regulate the management" of the business, the city had the right to issue a license, and to prescribe the compensation. That was also under the same law, the Act of 1872, which conferred power upon cities to grant licenses, and regulate omnibus drivers, and all others pursuing a like occupation, and to prescribe their compensation. The Supreme Court of this state decides in that case that the power to require a license is one of the means of regulating the exercise of a pursuit or business; that there are other means that might be adopted to accomplish the purpose, but that these municipal authorities are not restricted as to the means that they shall employ to regulate the business; and various authorities are cited by the court in support of the view which they take; and they repeat the ruling which had been previously made that a license was not, in the constitutional sense of the term, a tax.

The Supreme Court must also have considered and passed upon a question which has been discussed in this case, namely: whether or not the act which gave the authority to the city to license, was a general law under the constitution of this state; and they held that it was, and that it was intended to apply to all cities which might adopt it.

It is true that was a case of licensing a business which was generally admitted to be injurious in its character to those near the place where it was carried on; but it was a question of power, and the point in controversy was whether the city of Chicago had the right to exercise the power of licensing. The license fee demanded in that case was one hundred dollars. It seems to me that the question involved in this case arose substantially in that, and it was decided by the Supreme Court of the state that it was a valid exercise of the power to regulate a particular business. That is also the view taken by the Supreme Court of Pennsylvania in the cases referred to.

In view of these decisions and of several decisions of the Supreme Court of the United States within the last few years (*Munn* v. *Illinois*, 94 U. S. 113, and others), I think the weight of authority is in favor of regarding this as a police regulation.

One of the difficulties I have had with the case, has been whether it ought not to be regarded as a tax for revenue under the form of a license. It may be conceded that the argument is strong for treating it as a revenue measure; but as I before stated, there are some objections which I consider very weighty, and which would prevent me at this time from placing the decision on that ground. It may be admitted that, viewing it as a police regulation requiring the payment of a fee for the license, in amount it goes to the very verge of the exercise of police power; but as other courts have held that such a tax did not exceed that limit, I cannot hold that it does in this case; and, therefore, I shall, as at present advised, sustain the ordinance in question as a valid exercise of the police power of the city council.

There have been some arguments used by counsel which, I think, do not properly apply to the pleadings. It is insisted that the court must construe this as a tax, and not a mere police regulation. It is admitted that the Court of Appeals of New York did construe a similar license fee as a tax. The Supreme Court of Pennsylvania has given a different construction, and held it to be a police regulation. There is nothing in the bill by which the court can regard it absolutely as the exercise of the taxing power of the city. There is nothing in the bill which would authorize the court to hold, if it were a tax, that it was in violation of the Constitution of 1870, as not being uniform upon the particular class on which it operates. It is urged that it cannot be treated as a tax, because, if so, it would not be within this requisition of the Constitution of 1870, because the street railways come in direct competition with some of the steam railways; as that of the Illinois Central and the North-Western to Hyde Park and Evanston. There is nothing in the pleadings which would warrant the court in considering these facts, unless the court should take judicial notice that they do thus come in competition, without any allegation in the pleadings. Under the authorities, and upon the statements contained in the pleadings, the court cannot necessarily construe this as a tax. The court is at liberty, I think, to construe it as a police regulation.

These views have been given for the purpose of enabling the parties, if they desire, to take the case to the Supreme Court of the United States. The District Judge who heard the application for an injunction in the first instance, and granted it, is inclined to hold, as I understand, that this was not the proper exercise of the police power. I hold, for the purpose of deciding the case, that it is; and if the case is to be determined by the pleadings as they at present stand, it can be certified up to the Supreme Court as upon a division of opinion between the judges. If, however, the counsel desire to raise some of the questions which have been discussed in the argument, I think it would be advisable for them to amend the bill, and if they wish, leave will be granted for that purpose.

I. MAY STREET CAR COMPANIES BE REQUIRED TO PROCURE A LICENSE?

In Iowa it was held that the grant of an exclusive right by city ordinance to a street railway company, to construct, operate, and maintain over the streets of the city a street railway for the carriage of passengers, containing no provision in relation to the payment of a fee or license, did not exempt the company from paying a license fee, provided by a prior ordinance to be paid by all persons engaged in carrying passengers: *State* v. *Herod*, 29 Iowa 123. This case is, however, distinguishable from the principal case in this: the ordinance requiring the license was passed before and was in force at the time when the street car company was chartered, while in the latter case, the company was chartered before the license ordinance was passed.

It is not conceived, however, that this makes any difference, since the charter cannot give immunity from police regulation: *Thorpe* v. *Rutland & B. Railroad Co.*, 27 Vt. 149.

In *Frankford, &c., Co.* v. *Philadelphia*, 58 Penn. St. 119, it was held that corporations chartered to do business in a city are to be regarded as inhabitants of the city, and, unless exempted, are subject to its ordinances; that a grant to a corporation to carry passengers in cars over the streets of a city does not necessarily involve exemption from liability to municipal regulation, the right is neither greater nor less than a natural person possesses; that when a corporation is authorized to carry on a specified business within a municipal corporation, it is intended that the business shall be conducted under the restrictions which govern others transacting the same business; that liability to restrictions is involved in the designation of the place where the corporation's business is to be carried on; that a reasonable regulation of a privilege is not a denial of the right to exercise it; and that an ordinance of Philadelphia requiring passenger cars to be numbered and to be licensed on paying a stipulated sum for each car is a valid police regulation. And in affirmance of these views, see *Johnson* v. *Philadelphia*, 60 Penn. St. 445.

Apparently in conflict with these cases, is that of *The Mayor &c. of New York* v. *Second Ave. Railroad Co.*, 32 N. Y. 261, in which the railway companies were required to pay a fee to the mayor and to receive in return a license or certificate that the money had been paid. The ordinance imposed no duties to be observed by the companies or their servants, but the single act of paying the money. "It prescribes," said the court, "no regulations in regard to the size, dimensions, comfort and cleanliness of the cars, the speed at which the same shall be run, the manner of receiving and discharging passengers, their numbers and names, and the stations at which they shall stop. Regulations of police are regulations of internal or domestic government, forbidding some things and enjoining the performance of others for the security and protection, and to promote the happiness of the governed." The collection of revenue appeared to be the only object of the ordinance. It was therefore not a police regulation.

The court does not deny that a police regulation of street railway companies may be made. On the contrary, quite the reverse is implied. Nor is it denied that a license may be required to be procured, *as a police regulation.* The decision is only that an ordinance requiring a license to be procured *for revenue and not for police purposes* is invalid. The conflict, therefore, is only apparent; and the case is also in harmony with the rule laid down in *Johnson* v. *Philadelphia*, *supra*, that if a municipal regulation be adopted which would be lawful if intended for one purpose, and unlawful if for another, the presumption is that the purpose was lawful unless the contrary clearly appear. In the New York case the "unlawful purpose" of the ordinance, viz: the collection of revenue did "clearly appear;" indeed, it was the only purpose that appeared at all.

The cases seem therefore to sustain the authority of a municipality to ordain, as a police regulation, that street car companies shall take out licenses for their cars. But whether or not a city may require a street car company so to do depends upon its charter. In the two Pennsylvania cases power was conferred upon the city "to provide for the proper regulation of omnibuses, or vehicles in the nature thereof," and the court held this applied to "passenger railway cars. They are omnibuses, or if not, they are vehicles in the nature of omnibuses:" *Frankford, &c., Co.* v. *Philadelphia*, 58 Penn. St. 119, 125; *Johnson* v. *Philadelphia*, 60 Id. 445. The Illinois statute confers upon the city of Chicago power to license "omnibus drivers," &c., "and all others pursuing like occupations." This would seem broad enough to warrant the licensure of street railway companies.

II. What may Street Car Companies be charged for a License?

A municipal or other government, having power to issue and to require a license to be taken out, may charge for it a fee sufficient to cover the expenses of issuance and registration. All the license cases are agreed as to this.

Some cases go further and hold that a fee exceeding the cost of issuing and registering the license may be charged, on the ground that the license confers a special privilege or franchise for which the fee is only a price proper to be paid for it. Such a case is *Chilvers* v. *People*, 11 Mich. 43, where the license conferred the privilege of running a ferry from Detroit to Windsor, across the Detroit river.

And a license fee may be imposed as a means to restrain the carrying on of a business or the keeping of property, where to carry on such business or to keep such property to an unlimited extent would injuriously affect the health, safety or welfare of society. Thus, the sale of intoxicating liquors may be so restrained: *State* v. *Cassiday*, 22 Minn. 312; those who have not the means with which to purchase a license being debarred from engaging in the business; and in Wisconsin a dog license fee exceeding the cost of issuance and registration was justified as a proper exercise of police power, the court holding that the legislature might impose such sums for licenses as would operate as a partial restriction upon the business or upon the keeping of the particular kinds of property regulated: *Tenney* v. *Long*, 16 Wis. 566; and *Carter* v. *Dow*, 16 Id. 299.

It is difficult, therefore, to see any reason why, if in order to relieve overcrowded streets, it be necessary to reduce the number of cars being run, or to preclude an increase of their number, a license may not be required to be procured at a cost which shall operate a partial restraint upon the business. Judge SHARSWOOD was evidently of opinion that a charge for street car licenses sufficient to effect this purpose was proper, for he says: "In the case before us it may be allowable to conjecture that the principal object of requiring the license was to place some check upon the number of cars employed on the road, so that the streets might not be unduly obstructed and their passage by the citizens at large interfered with and prevented. If the sum charged was more than sufficient for this or any other proper object of police regulation, then indeed a question might arise as to whether it was not in effect a tax on the franchise:" *Johnson* v. *Philadelphia*, 60 Penn. St. 445, 450.

A number of cases justify the imposition of a license fee exceeding the cost of issuance and registration, and reason thus: The business or occupation sought to be licensed requires extra supervision and care from the city authorities; or, it uses and injures the public property to an extent greater than ordinary employments, and thus occasions the municipality extra and especial expense. Persons engaging in such business or occupation ought, therefore, to indemnify the municipality for the extra expense caused by them, and this, it is held, warrants the imposition of a license fee reasonably sufficient to pay for it.

Thus in *Cincinnati* v. *Bryson*, 15 Ohio 625, a fee of $3 was held authorized to be charged for a license to run a dray, and the court said: "It is manifest to every one, that in a large city vehicles of this description cause great destruction to the public ways; far greater than the usual ordinary travel of citizens otherwise employed. There is, therefore, no injustice in exacting a reasonable portion of the expenses which such special occupations cause to the community; and those who enjoy the special privilege, can refuse to bear a reasonable portion of the burden but with an ill grace. * * * The employment gives the drayman or hackman special privileges, which he enjoys to the prejudice of the city, in the injury necessarily done to her streets and pavements, to an amount far greater than any benefit to be derived from the price of the license, excluding the necessary burden of supervision."

And in *Cincinnati* v. *Buckingham*, 10 Ohio 257, an ordinance that no person should be licensed or permitted to occupy any place in the market, but upon making payment of twenty-five cents, for every market-day and occupation, was held valid. "The open spaces for the accommodation of the more transient frequenters of the market * * * demand the interposition of the city authorities to prepare, pave and keep them clean, to arrange the stands, preserve order and enforce the rules." But see *Kip* v. *Paterson*, 26 N. J. L. 298.

The Supreme Court of Michigan, CAMPBELL, J., dissenting, held that a fee of $5, required for a license to keep a stall to sell fresh meats outside the public markets was not a tax but a reasonable compensation which the city of Detroit may demand from those who will not sell in the public markets, for issuing the license, and besides for the additional labor of its officers, and expense thereby imposed. If, said the court, the vending of meats and vegetables be carried on elsewhere than at the public market, "the city may require the license and the bond, for protection and regulation; and may require such reasonable fee as will compensate either partially or fully for the additional expense of inspection and regulation thereby incurred. * * * If it be conceded that the city may demand a sum sufficient to defray the expense of making out the license, it is difficult to conceive why it may not also demand enough to pay all the expense attending the supervision of the trade at the place licensed." *Ash* v. *People*, 11 Mich. 347.

In *Boston* v. *Schaffer*, 9 Pick. 415, it was held that the city might require the proprietor of a theatre to take out a license and pay therefor $1000; that this fee was not a tax but of the nature of an excise on a particular employment. "There can, therefore," said the court, "be no objection to it in the present case admitting theatrical entertainments to be as meritorious as other occupations. But it seems to be peculiarly proper in employments of this kind. They require to be watched. Towns are put to expense in preserving order, and it is proper that they should be indemnified for inconveniences or injuries occasioned by employments of this nature." And see *Kitson* v. *Mayor, &c., of Ann Arbor*, 26 Mich. 325, 327.

In *Baker* v. *Cincinnati*, 11 Ohio St. 534, the city charged $63.50 for a license to give theatrical performances, and it was held not to have been illegally exacted. The court said: "We think the power to prohibit certain things to be done, unless a license be obtained, and to charge for such license, in many instances of its exercise, stands on the same principle as an assessment. An assessment stands on the principle of benefit to property; a charge for a license may be made in view of the special inconvenience and expense to the government, for the benefit of the individual who asks for the license. Things licensed may be such as should only be permitted under the regulation or supervision of public functionaries. The tax or charge may have reference to such regulation and supervision. Such is the case of exhibitors of shows and performances. An inquiry has to be made as to the character of those who propose to exhibit, and as to the nature of the thing to be exhibited. Then the exhibition may require additional attention from those intrusted with the care of the public peace, to prevent disorder and disturbance. The burden thus devolved on public officials, requiring, perhaps, an increase in their number or compensation, for the benefit of exhibitors of shows or performances, may justly authorize a charge beyond the mere expense of filling up a blank license. The same principle that would authorize a charge for the one extends to the other. To say that it is a tax, and goes into the treasury, does not disprove this object:" *Baker* v. *Cincinnati*, 11 Ohio St. 543. As to whether license is a tax or not, compare this case with *Mays* v. *Cincinnati*, 1 Ohio St. 268, and see *Cincinnati G. L. & C. Co.* v. *State*, 18 Ohio St. 242.

In *Van Baalen* v. *People*, 40 Mich. 258, pawnbrokers were required by ordinance to take out a license, and it was held that the business of pawnbroking gave rise to heavy city expense, especially in the increase of police duty and supervision which it necessitated; that the sum charged for the license ($200) did not greatly exceed the incidental and consequential expense of issuing the license, and therefore the ordinance was held valid.

And in *Chicago Packing Company* v. *Chicago*, 88 Ill. 221, it was held that packing-house proprietors doing business within one mile of the urban limits might, by ordinance of the city, be required to take out a license and to pay for it $100. The packing company had in this case taken out a license required to be procured by the town within whose limits it actually did business. "Nor does the fact," say the court, "that appellant is liable to pay a fee to each municipality for the privilege of pursuing a vocation the General Assembly regards of such a character as to require regulation and control, militate against the grant or exercise of the power" to regulate and control such establishments by requiring them to take out and pay for a license. And see *St. Paul* v. *Colter*, 12 Minn. 41.

The two Pennsylvania cases cited, *supra*, affirm the validity of an ordinance of the city of Philadelphia, requiring the street car companies to take out a license at $50 per car; but the weight of these cases as authority upon the point under discussion, is somewhat reduced by the fact that in neither case was the reasonableness of the fee passed upon. That question was not before the court, and it expressly refrained from giving an opinion upon it. See opinion of SHARSWOOD, J., in *Johnson* v. *Philadelphia*, 60 Penn. St. 450.

Nor is *May* v. *Cincinnati*, 1 Ohio St. 268, in conflict with these views. In that case, hucksters were required by ordinance to take out a license each year. One did so four successive years, and paid for the four licenses $95, and $4 fees for issuance. This money he then sought to recover on the ground that the ordinance requiring its payment was *ultra vires* and void. The legislature had, by an especial enactment, denied to the city of Cincinnati power "to levy any tax * * * *or other charge*" upon persons bringing provisions to the market, and this was the primary ground upon which the ordinance was declared invalid. "The law," said the court, "exempts every person bringing provisions to the market * * * from any charge whatever." The court held that revenue and not the prevention of huckstering was the object of the ordinance, and that it was not a police regulation, since it was for another than police purposes. It is conceded that where revenue and not regulation is the object of the licensure, it is not valid as an exercise of police power. This was the case in *Mayor, &c., of New York* v. *Second Avenue Railroad Co.*, *supra*.

But in *Mayor* v. *Yuille*, 3 Ala. 137, a city ordinance required bakers to take out a license at an expense of $50, and the court said that it was "inclined to doubt the propriety of that portion of the by-law * * * which requires $20 to be paid as a license, unless the latter can be supported under the taxing power of the corporation." But this is a mere dictum, for the court had already denied the validity of the by-law on other and different grounds. The weight of authority is clearly against this position.

The case, however, suggests the objection most frequently made to charging these license fees, namely, that they are taxes, and as such cannot be laid by the municipality.

However, they are not taxes. The object for which taxes are levied and that for which these fees are charged are different. Revenue is the object of taxation, regulation that of licensure, and it matters not that the license fee is payable into the treasury, that does not make it a tax: *Frankford, &c., Railroad Co.* v. *Philadelphia*. 58 Penn. St. 119; *Johnson* v. *Philadelphia*, 60 Id. 445; *State* v. *Herod*, 29 Iowa 143; *Louisville Central Railroad Co.* v. *Louisville*, 4 Bush 478; *People* v. *Thurber*, 13 Ill. 554; *East St. Louis* v. *Wehrung*, 46 Ill. 292; *St. Paul* v. *Colter*, 12 Minn. 51; *Rochester* v. *Upman*, 19 Id. 108.

So long as the fee charged is one reasonably calculated to effect the object sought, the licensure is valid as an exercise of police power, and is not invalid as a tax. But if the fee be unreasonable and more than sufficient to effect the regulative purpose, it is a tax, and as such, is unauthorized and uncollectable, unless the corporation has power to impose it for revenue purposes: *State* v. *Roberts*, 11 Gill & J. 506; *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Cincinnati* v. *Bryson*, 15 Ohio 625; *Freeholders* v. *Barber*, 7 N. J. L. 64; *Kip* v. *Paterson*, 26 Id. 298; *Bennett* v. *Birmingham*, 31 Penn. St. 15; *Commonwealth* v. *Stodder*, 2 Cush. 562; *Chilvers* v. *People*, 11 Mich. 43; *Mayor* v. *Yuille*, 3 Ala. 137; *Johnson* v. *Philadelphia*, 60 Penn. St. 451; *State* v. *Herod*, 29 Iowa 123; *Mayor* v. *Second Avenue Railroad Co.*, 32 N. Y. 261; *Home* v. *Ins. Co.* v. *Augusta*, 50 Ga. 530. But courts will not closely scrutinize a license fee with a view to adjudge it a tax, where it does not appear unreasonable in amount, in view of its purpose as a regulation. Courts will not review municipal discretion in imposing license fees where it has not been abused. "The subject" (*i. e.* what sum shall be charged), said GRAVES, J., "will not admit of nice calculation, and it would be futile to require anything of the kind:" *Van Baalen* v. *People*, 40 Mich. 258; *Ash* v. *People*, 11 Mich. 347; *Johnson* v. *Philadelphia*, 60 Penn. St. 451; *Burlington* v. *Putnam Ins. Co.*, 31 Iowa 102.

Undoubtedly, street cars require especial police service. Extra officers are required to see that the cars do not obstruct the street crossings, and to see that vehicles do not delay or hinder the cars. They are required to preserve order, and to prevent theft and other crime likely to be committed in the crowded cars, and to arrest persons disorderly thereon or otherwise offending.

It would be difficult to demonstrate that $50 per car is an unreasonable fee to charge for these extra services, and, if it be reasonable, the ordinance requiring the license to be taken out and the fee to be paid is valid.

ADELBERT HAMILTON.

Chicago, March 9th, 1881.

Supreme Court of the United States.

GEORGE B. BLAKE ET AL. EXECUTORS OF G. B. BLAKE, DECEASED *v.* JOHN W. McKIM, JUDGE OF THE PROBATE COURT FOR THE COUNTY OF SUFFOLK, MASSACHUSETTS.

Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different states, has not distinctly provided for the removal, from a state court, of a suit in which there is a controversy, not wholly between citizens of different states, and to the full and final determination of which one of the necessary or indispensable parties, plaintiffs or defendants, seeking the removal, is a citizen of the same state with one or more of the plaintiffs or defendants against whom the removal is asked.

IN error to the Circuit Court of the United States for the District of Massachusetts.

This was an action upon a probate bond executed by James M. Howe, as trustee under the will of Henry Todd, with two sureties, one of whom was the testator of the defendants to recover from the estate of the deceased surety the sum of $50,000 for alleged breaches, upon the part of the trustee, of the bond sued on. The action was commenced in one of the courts of Massachusetts, by a citizen of Massachusetts for the use of citizens of that state, against the executors of George Baty Blake, two of whom are citizens of Massachusetts and one a citizen of New York.

The executors filed a joint answer, which presented a common defence, and subsequently, in proper time, filed their joint petition for the removal of the case into the Circuit Court of the United States for the District of Massachusetts. The petition was dismissed by the state court. The transcript of the record was, nevertheless, filed in the Circuit Court. By the latter court the case, upon motion of plaintiff, was remanded to the state court. From that order this writ of error was prosecuted.

The opinion of the court was delivered by

HARLAN, J.—We are of opinion that the case, as made by the plaintiffs, is not one of which the Circuit Court of the United States can take jurisdiction.

In the *Removal Cases*, 100 U. S. 468, we had occasion to construe the first clause of the second section of the Act of March 3d 1875, which declares that *either party* may remove to the Circuit Court for the proper district any suit of a civil nature, at law or in equity, pending in a state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and in which there is "a controversy between citizens of different states." We held that clause to mean "that when the controversy, about which a suit in the state court is brought, is between citizens of one or more states on one side, and citizens of other states on the other side, either party in the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants;" that, upon arranging the parties on opposite sides of the real and substantial dispute, if it appears that those on one side are all citizens of different states from those on the other, the suit may be removed—all those on the side desiring a removal uniting in the application therefor. In that case an Iowa corporation represented one side of the dispute, while the other was represented by citizens of Ohio and Pennsylvania. The controversy was as broad as the suit.

In *Barney* v. *Latham*, decided at the present term, we held (construing the second clause of the second section of the Act of March 3d 1875) that one or more of the plaintiffs or defendants, actually interested in a controversy wholly between citizens of different states, and which can be fully determined as between them, can remove from the state court the entire suit of which that separable controversy forms a part, provided it involves the amount prescribed as necessary to federal jurisdiction.

The executors of Blake—each of them having qualified and acted in the execution of the trust—were all indispensable parties to the suit: Gould's Pleadings, sect. 73, ch, 4; Dicey on Parties to Actions, s. P. 322; 1 Chitty Pl. s. P. 52). They all appeared and submitted to the jurisdiction of the court. The present case is, therefore, one in which the suit embraces only one indivisible controversy. It is not wholly between citizens of different states, and fully determinable as between them, because some of the defendants are citizens of the same state with the plaintiffs.

The contention upon the part of counsel for the executors is, that the suit is removable upon their joint petition, under the first clause of the second section of the Act of 1875. We are unable to concur in that view. There is, undoubtedly, some ground for such a construction, but we are not satisfied that Congress intended to enlarge the jurisdiction of the Circuit Courts to the extent that construction would imply. The principal reason assigned in its support is, that the first clause of the second section of the Act of 1875 follows the words of the Constitution, when giving jurisdiction to the Circuit Court of a suit in which there shall be "a controversy between citizens of different states,"—language which, it is claimed, does not necessarily require that such controversy must be wholly between citizens of different states. But that consideration was pressed upon our attention in the *Case of the Sewing Machine Companies*, 18 Wall. 553, which arose under the Act of March 2d 1867. (14 Stat. 558.). That act authorizes the removal of a suit, involving the requisite amount, 'in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state,' upon an affidavit by the latter, whether plaintiff or defendant, showing that he has reason to believe, and does believe, that, from prejudice or local influence, he would not be able to obtain justice in the state court, The argument there, by counsel of recognised learning and ability, was that a controversy between citizens of different states is none the less a controversy between citizens of different states because others are also parties to it; that to confine the federal jurisdiction to cases, wherein the controversy is between citizens of different states *exclusively*, is to interpolate into the Constitution a word not placed there by those who ordained it, and one which materially limits or controls its express provisions. We declined to adopt that construction of the statute, and held that Congress did not intend by the Act of 1867 to confer the right of removal where a citizen of a state, other than that in which the suit is brought, is united, as plaintiff or defendant in the controversy, with one who is a citizen of the latter state. The construction for which counsel for plaintiffs in error here contend cannot well be maintained without overruling the principles announced in the *Case of the Sewing Machine Companies.*

It is to be presumed that Congress, in enacting the statute of 1875, had in view as well previous enactments, regulating the removal of causes from the state courts, as the decisions of this court upon them. If it was intended, by that act, to invest the Circuit Courts with jurisdiction of *all* controversies between citizens of different states, although others might be indispensable parties thereto, such intention would have been expressed in language more explicit than that found in the Act of 1875. We are not disposed to enlarge that jurisdiction by mere construction. We are of opinion that Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different states, has not distinctly provided for the removal from a state court, of a suit in which there is a controversy not wholly between citizens of different states, and to the full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal, is a citizen of the same state with one or more of the plaintiffs or defendants against whom the removal is asked.

The judgment of the Circuit Court remanding the cause to the state court is, therefore, affirmed.